IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, ET AL.,
Petitioners,

v.

BASIL HANIOTI, ETC.,
Respondent.

RESPONDENT'S BRIEF

FRANK L. MILLER,
Counsel for Respondent.

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Statutes and Rules Involved Not Mentioned by Appellants

Rule 55 (b) (2) of the Federal Rules of Civil Procedure:

"(b) Judgment. Judgment by default may be entered as follows: * * *

"(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary

to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

Rule 60 (b) of the Federal Rules of Civil Procedure:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the pro-

cedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949."

Rule 73 (a) of the Federal Rules of Civil Procedure:

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be thirty days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be sixty days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such

action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

Rule 20 of the Admiralty Rules:

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulator's. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

Section 826, subdivision (9) of the Civil Practice Act of the State of New York:

"9. In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

Section 764 of the Civil Practice Act of the State of New York:

"764. Issuance of execution against the person generally. Subject to the exception specified in the

next section; an execution against the person of a judgment debtor, may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

Questions Presented

1. Is the instant action against the respondent in fraud cognizable in admiralty?

2. Did the libellants meet the burden to establish, by legal proof, the allegations of the libel where the respondent had filed an answer placing in issue the material allegations and, if so, did the District Court err in granting a default decree based upon insufficient evidence?

3. Did the District Court act arbitrarily and abuse its discretion in refusing to set aside the default judgment?

4. Was the inclusion of a provision for execution against the person of the respondent in the decree unauthorized in an admiralty suit and otherwise contrary to law?

5. Was the notice of appeal, filed within thirty days of the denial of the respondent's motion to vacate the default judgment, timely?

6. Did the docketing of the decree as a judgment, in order to issue an execution, fix the time within which to appeal?

7. Did the making of the motion to open the default toll the running of the time to appeal until the entry of the order denying the motion?

Summary of Argument

1. The instant action is not an action based on a maritime contract, either express or implied, but is a common law action to recover for damages for obtaining moneys through fraud and false representations, over which the Admiralty Court does not have jurisdiction.

2. The judgment is not supported either by the allegations of the libel or the proof. The respondent filed an answer denying the material allegations of the libel and because he did not know when the case was on for trial, and had received no notice to that effect, he did not appear. Nevertheless, the District Court permitted the libellants to take an inquest, but received no oral testimony, relying instead upon voluminous transcripts of testimony given by the respondent and other witnesses in an action *in rem* instituted in the United States District Court in Baltimore by Todd Shipyards Corporation against "SS City of Athens", and in which the libellants intervened as parties to establish their claims. The District Court could not have read this testimony within the short time devoted to the inquest. In any event, the testimony fails to establish frauds on the part of respondent but, on the contrary, the testimony shows that the respondent was innocent of fraud.

3. Denial of respondent's motion to vacate the default judgment was an abuse of discretion. The default was not

wilful and was excusable. Moreover, the entry of a judgment by default without giving the notice required by the Federal Rules of Civil Procedure was improper and required the granting of respondent's motion to vacate the judgment.

4. The inclusion in the decree of a provision for the issuance of execution against the person of the respondent to enforce the payment of the judgment was unlawful. Whatever contractual allegations, if any, are contained in the libel, and it is contended that none are, they do not relate to transactions with the respondent but with various corporations. It is essential that fraud be perpetrated in incurring the liability on a contract. The respondent's liability, on the theory of the libel in the instant case, would be that of a tort feasor in a fraud action. There was not one iota of evidence submitted before the District Judge at the inquest to prove any of the requisite allegations of fraud to bring it within Section 826, subdivision (9), of the Civil Practice Act.

Moreover, Rule 20 of the Admiralty Rules authorizes the issuance of an execution under the state law against the property of the respondent to enforce a decree or judgment in admiralty, but not against the person of the respondent. The decree is equitable in nature and hence the body execution is unauthorized by Section 826, subdivision (9) of the Civil Practice Act.

The body execution is also unauthorized for the reason that there was no trial of the action, within the meaning of Section 826, subdivision (9) of the Civil Practice Act.

5. The notices of appeal were timely. There are three notices of appeal in the instant case. The first two, which libellants wholly ignore, were filed within thirty days from the entry of orders denying the motion to set aside the default judgment and are proper and timely, since the two

orders entered denying the motion to set aside the judgment taken by default are final and appealable.

The third appeal was taken, perhaps in an excess of caution, from the default decree docketed as a judgment on January 11, 1955, by a notice of appeal dated March 24, 1955, within a period of ninety days from the docketing of the decree. This appeal is timely for two reasons: firstly, because the time to appeal starts to run ordinarily from the docketing of the decree as a judgment; and, secondly, the order denying the motion to set aside the judgment was not entered until February 9, 1955, and the running of the time to appeal is tolled until the entry of the order denying the motion to set aside the default decree. However, it is immaterial whether the appeal from the decree was timely since the first two appeals from the orders denying the motion to set aside the default decree were admittedly timely.

Statement

On the 16th day of September, 1952, an *in personam* suit in admiralty was commenced by the filing of a libel and a writ of foreign attachment against the "S. S. Carmen", which was owned by the Basile Shipping Co., Inc. (R. 245-258; F. 14-27).

The libel alleges that the respondent, Basil Hanioti, hereinafter referred to as the "respondent", did business under his own name and under various other names and corporations and organized the Basile Shipping Co., Inc. for the purpose of engaging in fraudulent practices; that the respondent, operating through the various corporations as his *alter egos*, owned and controlled a certain passenger vessel known as the "City of Athens"[1] of Hon-

[1] This vessel was owned by a Panamian corporation, Sociedad Naviera Transatlantica S. A. See *Ickes v. Hanioti*, 276 App. Div. 78, 92 N. Y. Supp. (2d) 914.

duran registry, and between November 9th, 1946 and July 23rd, 1947, the said respondent and his *alter egos* advertised and held out the steamer "City of Athens" as a common carrier of passengers for hire; that the libellants paid monies for passage upon said vessel; that the libellants never obtained the passage for which they paid and that the respondent converted the monies so fraudulently obtained to his own use and purposes. None of the respondents named in the libel were served with process.

The writ was executed by the United States Marshal against the "S. S. Carmen" which was owned by the Basile Shipping Co., Inc. because of the allegation that the respondent is the owner of the "S. S. Carmen" and that he is conducting business under the name of Basile Shipping Co., Inc., his *alter ego* and created by him in an attempt to shield himself from liability and satisfaction of any decrees that may be issued against him in connection with his manipulations and operations, and is, in fact, a fraud and a sham and a mere dummy within his control.

The libel, in effect, charges that the respondent obtained monies through various acts of fraud and fraudulent representations and used the various corporations to accomplish the fraud and converted monies so fraudulently obtained to his own use.

The charges of obtaining monies through fraud, conversion and misrepresentation of funds are all interwoven into one cause of action. *There is no allegation in the libel that the respondent entered into any contract with any of the libellants.*

After the said writ had been executed by the United States Marshal, a third party claim was filed on behalf of the said Basile Shipping Co., Inc., a New York corporation, which had its principal place of business in the Southern District of New York, claiming that it was the lawful owner of the "S. S. Carmen" and that said vessel had been

failed to offer any admissible evidence in support of the libel; (c) that the respondent had a good and meritorious defense to the alleged cause of action; (d) that although the suit was brought in admiralty, it was, in fact, a civil suit under which the Federal Court did not have jurisdiction since it failed to allege diversity of citizenship and the jurisdictional amount in connection with each claim; and (e) that under no circumstances should the decree have carried with it a writ of execution against the person of the respondent.

The said motion was denied on the 11th day of January, 1955 by a written memorandum endorsed upon the moving papers (R. 229-315a). On the same day, to wit, January 11th, 1955, the final decree was docketed as Judgment No. 59804. This apparently was necessary in order to issue execution to the Marshal.

A proposed order with notice of settlement was thereupon submitted based upon the decision and thereafter the District Judge refused to sign said order and handed down an opinion and order on February 9th, 1955 again denying the motion of the respondent to vacate the decree of December 6th, 1954 (R. 317-324; T. 5-11).

The respondent appealed from the decision of January 11th, 1955 by notice of appeal dated and filed the 9th day of February, 1955, within the thirty (30) day period (R. 325). Said respondent appealed from the opinion, decision and order of February 9th, 1955 by notice of appeal dated and filed the 17th day of February, 1955, within the thirty (30) day period from said order (R. 326). Said respondent also appealed from the decree docketed as a judgment on the 11th day of January, 1955 by notice of appeal dated and filed the 24th day of March, 1955, within ninety (90) days from the date of the docketing of the decree as a judgment (R. 391; T. 4). The Court of Appeals reversed the District Court and remanded the cause back

POINT I

The United States District Court did not have jurisdiction over the subject matter for the reason that the libel did not set forth a claim for the enforcement of a maritime contract within the admiralty jurisdiction of the court and that jurisdictional facts for a civil suit were not alleged.

A.

The question arises whether the libel sets forth a cause of action seeking the recovery of passage monies prepaid as consideration under maritime contracts of carriage breached by non-performance, or whether the libel is one for damages by reason of fraud, conversion and misappropriation of funds.

The libel charges that the respondent organized various dummy corporations for the purpose of engaging in fraudulent practices; that the respondent and the various corporations were hopelessly insolvent; that the respondent obtained monies through various acts of fraud and fraudulent representations and used the various corporations to accomplish the fraud and converted the monies so fraudulently obtained to his own use.

There is no allegation in the libel that the respondent entered into a contract with any of the libellants. There is no allegation in the libel showing a diversity of citizenship between the libellants and the respondent or showing that each libellant had a claim for Three Thousand ($3,000.00) Dollars or over. The libel sets forth purely and simply a cause of action in fraud or perhaps in equity to impress a constructive trust. In no event does it set forth a claim for breach of a maritime contract. An analysis of the libel could result only in the statement that it is based upon fraud, fraudulent representations, willful

wrongfully attached and that the respondent had no interest whatsoever in said vessel. Hearings were held before the Honorable Sylvester J. Ryan, United States District Judge (R. 1-187a) and no proof having been offered to establish that Basil Hanioti was the owner of the "S. S. Carmen" or had any interest in the said vessel, individually or through Basile Shipping Co., Inc., which was, in fact, the owner thereof, the Court rendered a decision on the 24th day of September, 1952 in which it held that the Court was without jurisdiction in said suit to issue a writ of foreign attachment and, therefore, dismissed the same (R. 264-269).

Were it not, therefore, for the fact that the respondent, Basil Hanioti, who had not been previously served with the libel, appeared voluntarily, the libel, for all purposes, would have been terminated at the point of the dismissal of the writ of attachment by District Judge Ryan (R. 270). The answer subsequently interposed by the respondent denied all of the material allegations of the libel, including those which alleged that the respondent was doing business under his own name and as the various corporations named therein, and that he owned and controlled the vessel known as the "City of Athens", and the allegation that he was the owner of the vessels "Basile" and "Carmen", and that he was conducting business under the name of Basile Shipping Company, Inc., the record owner of said vessels.

The trial of the suit was scheduled for November 23rd, 1954. Because respondent had not been notified and did not know that the case had been so scheduled, he did not appear, but Frank H. Cooper, Esq., one of the attorneys of record for him, who did appear, permitted an inquest to be taken without making any effort to defend the suit.

The libel was filed on behalf of approximately One Hundred Thirty (130) individuals. It was never verified by the libellants but by the attorney in the alleged absence

of the libellants. During the course of the inquest, the attorney for the libellants did not produce any libellant to give testimony in support of any of the allegations in the libel. Not one libellant was called to testify that he had entered into a contract with the respondent, or that he paid any moneys to the respondent, or that any moneys paid to a third party was in reliance upon representations made by the respondent, or any third person acting at his request, or that any moneys paid to the passenger agent were received by the respondent and converted to his own use. The attorney for the libellants introduced and had marked in evidence transcripts of testimony of the respondent and others in an action *in rem* entitled *Todd Shipyards* v. *City of Athens et al.*, pending in the United States District Court for the District of Maryland, the Commissioner's report in said action and a list of libellants and amounts allegedly paid.

The libellants' attorney then proceeded to inform the Court as to the alleged contents of the voluminous exhibits and stated, among other things, as follows:

(a) That the respondent testified and admitted that the several corporations he had were all dummies;

(b) That he misappropriated the passage monies;

(c) That the list of passengers and the amounts set forth opposite their names, as appended to the libel, were taken from the original records prepared by the treasurer and director of one of the respondent's corporations that was selling the tickets; and

(d) That the list was taken from handwritten documents and was supplied by Mr. Kiernan, the treasurer-director who was in charge of the bookkeeping and accounting work in the passenger agency corporation owned by the respondent.

The exhibits offered are voluminous and extensive. The statements made by Mr. Graham are not supported by the exhibits offered but, on the contrary, show that the respondent did not admit that the different corporations were his dummies or that he misappropriated any passage monies or that his corporations were selling tickets or that he owned the corporation that was the passenger agency.

An analysis of the exhibits offered in evidence by Mr. Graham establishes conclusively that the allegations of the libel are entirely unsupported by the record and no *prima facie* case was presented at the inquest and, secondly, that the respondent had a good and meritorious defense to the libel, which alleges fraud, the obtaining of moneys through fraudulent representations, and/or willful conversion of funds.

The transcript of the testimony disprove Mr. Graham's representations to the Court because it shows that the American Mediterranean Steamship Agency, Inc. was the passenger agent and that all passage monies that were required to be paid before issuance of a passage ticket on the "City of Athens" were received by said corporation which was located in the Borough of Manhattan, City of New York, since early in February, 1947, controlled all of the berthings on the "City of Athens", both east and westbound, publicized the sailings by mail and advertising in travel trade journals, and since their appointment as general passage agent, performed all of these duties which were described in an agency agreement. The exhibits relied upon by the libellants show that the respondent was neither an officer nor a stockholder of said American Mediterranean Steamship Agency, Inc. and that Walter J. Letts, who was produced on behalf of the libellants by Mr. Graham in the Todd Shipyard action testified that he was president of American Mediterranean Steamship Agency, Inc. and that said corporation was owned by World-

N. Travels, Inc.; an organization which is the passage agent for all conference lines and all airlines and doing a general travel business.

The transcript of the minutes taken in the Todd Shipyards Corp. action discloses that the respondent testified that the "S. S. City of Athens" was purchased in 1946 for $430,000 and had been placed with the Todd Shipyards for repairs expected to cost not more than $80,000; that the ship was repaired on two separate occasions; that it had made three round trip voyages and then it was seized by the Todd Shipyards Corp. for the non-payment of a balance claimed to be due for such repairs; that the respondent had been informed at such time that the bills for such repairs would cost up to $750,000; that there had been paid against these bills to Todd Shipyards approximately $270,000 and that over $150,000 of the monies obtained for passenger fares had been paid directly or indirectly to Todd Shipyards on account of said repairs and that the respondent personally never received any part of the passenger fares paid to the American Mediterranean Steamship Agency, Inc.

The analysis of the testimony given by witnesses produced by Mr. Graham, libellants' attorney, at the trial of the Todd Shipyards action in Baltimore and offered in evidence as exhibits at the inquest in the case at bar shows that there was no misrepresentation of any fact in the solicitation by the passenger agent; that the solicitation was not made with the intent to defraud the passengers and that neither the passenger agent nor the respondent nor the owners of the "S. S. City of Athens" at the time when the passenger agent was hired or at the time that they publicized by mail and advertising the schedules for the sailings of the City of Athens knew or could have known that the Todd Shipyards intended to or would seize the vessel, City of Athens, so as to prevent the sailing. The proof

to the contrary is that the City of Athens was purchased for a substantial amount of money in 1946; that it did make three round trip voyages in accordance with its advertising; that it did place the ship for repairs with Todd Shipyards; that repairs were made; that the principals had never expected that the amount chargeable for such repairs could possibly reach the amounts claimed by Todd Shipyards; that $270,000 had been paid on account of these repairs and at least $150,000 came from monies collected from passenger agents.[2]

The District Judge, apparently relying upon the representations made by Mr. Graham as to the contents of these exhibits, entered a default decree on the 6th day of December, 1954, against the respondent requiring him to pay to the libellants the sum of One Hundred Thirty Thousand, Three Hundred Eighty-three and 69/100 ($130,383.69) Dollars. The decree also contained a provision that, unless it was satisfied within ten (10) days from the date of service upon the respondent's attorneys, with notice of entry thereof, and unless execution thereunder was stayed by an appeal with proper and approved security thereon within the ten (10) day period, the Clerk of the District Court was directed to issue to the United States Marshal a writ of attachment against the person of the respondent.

On the 7th day of December, 1954, the respondent, acting through a new attorney, obtained an order to show cause to vacate the default decree and to enjoin the enforcement of the body execution (R. 299-315a). In support of said motion, the respondent urged (a) that the default was not willful or deliberate and that the libellants were not entitled to enter a default judgment; (b) that the libellants failed to offer evidence at the inquest before the District Court sufficient to make out a *prima facie* case and

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[2] The testimony in support of the statements herein made is set out *infra* under Point II.

to the District Court for dismissal for lack of admiralty jurisdiction.

The Court of Appeals, in a unanimous opinion written by Circuit Judge Medina, stated that the record presents a maze of complications, procedural and otherwise, and of the various points raised it was necessary to discuss but one since they had concluded that there was no jurisdiction in admiralty. Although the Court of Appeals recognized that the contract for the transportation of passengers by sea is a maritime contract and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, it held that the libel in the case at bar sets forth no such claim. The Court of Appeals stated that the claim is in the nature of the old common law *indebitatus assumpsit* for money had and received based upon the wrongful withholding of monies by respondent on the theory that in equity and good conscience he is under a duty to pay them over to libellants, but if the libel is viewed as stating a claim based upon tortious conduct in the nature of fraud as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer (T. 1-3).

The reversal by the Court of Appeals was clearly based upon the finding that the libel stated a claim alleging fraud which was not within the admiralty jurisdiction of the Court and did not determine the various points raised and the maze of complications, procedural and otherwise, which the record presented. This Court granted certiorari and permitted the libellants to proceed upon a printed part of the record which touched only upon the question of jurisdiction.

The notices of appeal from the orders denying the motion to set aside the default decree are not included in the printed record and the attorney for the libellants studiously avoids mentioning, in his brief, that respondent had filed said notices of appeal.

conversion and wilful misuse of funds all interwoven into one cause of action.

Circuit Judge Medina recognized the principle of law that a contract for transportation of passengers is a maritime contract and that a suit for its enforcement would be within the admiralty jurisdiction of the District Court, but stated that the libel in the case at bar sets forth no such claim.

A case in point is *Kaufman et al. v. John Block & Co. Inc. et al.*, 60 Fed. Supp. 992. There the libel contained two causes of action. The first cause of action alleged a breach of contract to carry goods by sea and was within the admiralty jurisdiction of the court. The second cause of action alleged that the principal was a wholly fictitious corporation and that the respondents knew it was a wholly fictitious corporation which was not the charterer or operator of the "Marie Anna" or any other vessel; that the respondents represented themselves as officers, directors and agents for the "Marie Anna" and used fictitious names in so holding themselves; that the respondents knew or should have known that the vessel "Marie Anna" was a yacht, prohibited from carrying cargo for hire, etc.; that the checks by which the libellants prepaid the freight were cashed by the Marie Anna, Inc., through a checking service after a resolution of the corporation had been passed authorizing the service to cash the corporation's checks and the respondents retained the moneys received from the checks, and the libellants thereby suffered damages. The District Court, with respect to the second cause of action, stated, at page 993, as follows:

> "This cause of action is either for moneys had and received or for fraud. In either event, it is not maritime but a pure common law action. This court's admiralty jurisdiction does not extend to any suit not maritime. Rea v. The 'Eclipse', 135

U. S. 599; 10 S. Ct. 873, 34 L. Ed. 269; nor can non-admiralty causes of action be joined to admiralty ones. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 9 Cir., 73 F. 2d 200; The Yankee, D. C., 17 F. Supp. 512, 513.

Giving full faith and credit to the allegations of the second cause of action in the libel, it seems to me that the charge set forth is one of obtaining money under false and fraudulent representations; a common law action. True, the artifice used is a bill of lading but this cause of action has not to do with the bill of lading but with the obtaining of money by fraud."

A cause of action charging fraud and deceit and falsely representing corporate power in a corporation to make an alleged guarantee of demurrage in the event a certain vessel fails to clear the port of loading within the free time allotted to the shipper is not within admiralty jurisdiction and another cause of action for breach of an individual representation and warranty that the said guarantee was the full act and deed of the corporation would not bring it within the jurisdiction of the admiralty court. *Black Sea States S S Line v. Association of International Trade Dist. 1, Inc., et al.*, 95 Fed. Supp. 180.

In *Home Insurance Co. v. Merchants Transportation Co.*, 12 Fed. 2d 931, aff'd 16 Fed. 2d 372, C. C. A. 9, a libel was filed in admiralty to recover marine insurance payments made allegedly upon misrepresentations of defendant. The Court found that the issue presented was not maritime stating:

"So in the present case, before any question of maritime law can arise or be considered, libellant must first establish that it parted with the money sought to be recovered relying upon misrepresentations made by respondent. This fact ousts the admiralty jurisdiction" (p. 932).

In *Williams v. Providence Washington Insurance Co.*, 56 Fed. 159 (D. C. S. D. N. Y.), a libel was filed to recover under a policy of insurance issued by the respondent against perils of the sea. The boat was damaged by sea perils in Long Island Sound, at a dock at Stamford, Conn. The policy was accepted and a premium paid in reliance upon certain representations which were false and fraudulent when made. The libellant claimed that since it complied with the conditions of the policy it was entitled to recover damages in the amount of the loss. Exceptions were filed to the libel for lack of jurisdiction of the cause of action stated in the libel. The Court, in sustaining the exceptions to the jurisdiction stated, at page 160, as follows:

> "* * * The complaint is, in fact, an action for false and fraudulent representations, by which the libelant was induced to accept the policy, supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it. It is not brought like The Electron, 48 Fed. Rep. 689, for any misrepresentations in the policy or for damages in the execution of the policy. The representations here are no part of the contract, but outside of it, and anterior, or preliminary to the contract, and as such not properly maritime."

In the case of *Commercial Trust Co. v. United States Shipping Board E. F. Corp.*, 48 Fed. 2d 113, C. A. 2, the Court stated with respect to suits brought in admiralty to recover money obtained by fraud on maritime contracts:

> "As the reasons which made it unlawful for him to retain the proceeds were non-maritime, the obligor failed."

In the case at bar, there is one cause of action alleging fraud, false representation and wilful conversion. The libellants, in their memorandum, contend that the cases of

Silva v. *Bankers Commercial Corp.*, 163 Fed. 2d 602 and *United Transportation and L. Co.* v. *N. Y. & Baltimore T. Lines*, 185 Fed. 386, have been repudiated as authority in the *Sword Line Inc.* v. *United States*, Docket No. 23723, decided December 14, 1955 and not yet reported. Although the Court of Appeals cited the *Silva* and the *United Transportation* cases as authority for denying admiralty jurisdiction where the suit is for money had and received, the decision rests mainly upon its statement *that if the libel is viewed as a claim based upon tortious conduct in the nature of fraud, the case against admiralty jurisdiction is even clearer.*

The libellants, in their brief, state that *Silva* v. *Bankers Commercial Corporation*, cited *supra*, and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, cited *supra*, appear to have been repudiated as authority during the pendency of this cause before this Court, by the same Court of Appeals, with a different bench in *Sword Lines Inc.* v. *United States*, *supra*. That action concerned an overpayment of charter hire. Circuit Judge Learned Hand, in the *Sword Line* case, in referring to the holding of the Supreme Court in the *Krauss Bros. Lumber Co.* case, cited *infra*, stated in part as follows:

> "It assumed that the goods had been delivered, and put its decision upon the premise that the carrier had promised, not only to deliver the goods for the agreed hire but thereafter not to demand anything further; and such a demand, if it was indeed a breach of the maritime contract, was of course cognizable in the admiralty. Having so interpreted the contract, the Court did not find it necessary to decide whether a claim in quasi contract, based upon an unjust exaction after the contract had been completely performed, was also cognizable in the admiralty. For my own interpretation of the decision, I rely upon what Stone, J., said on Page 124, which is all there is on the point: 'Even under the common

> law form of action for money had and received, there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there as in admiralty, is the violation of some term in the contract of affreightment whether by failure to carry or by exaction of freight which the contract did not authorize.' My brothers do not agree with such a limited understanding of the decision; they think that it should be read so as to cover claim in quasi contract; but under either understanding it is clear that the District Court had jurisdiction over the suit at bar."

In the *Sword Line* case the issue of admiralty jurisdiction was neither briefed nor argued. Indeed, the suit was brought in admiralty and, upon appeal, the Government's brief stated that the parties were in agreement that jurisdiction lay in admiralty but that, since jurisdiction could not be conferred by consent, it was for the Court to determine whether it had jurisdiction. The Government's brief was served ten days before argument and the libellant did not brief the jurisdictional point. The decision of the same circuit in this case was not called to the attention of the Court and the libellant, on January 19, 1956, filed a petition for rehearing urging, *inter alia*, that the *Sword Line* decision was in conflict with the decision in this case.

Moreover, *Sword Line* involved no question of fraud and no prayer for equitable relief. It arose from the charter by the Government to Sword Line, pursuant to Section 5 of the Merchants Ship Sales Act of 1946, 50 U. S. C. App. 1738, of a group of vessels. Section 709 (a) of the Merchant Marine Act, 1936, 46 U. S. C. 1199(a), which was expressly made applicable to this and other charters, provided that the Government was to be paid fifty percent of the profits as additional charter hire. Nevertheless, the charter provided for and the Government demanded a share of the profits at rates of fifty, seventy-five and ninety percent. The libellant alleged that the charter violated

the statute and recovery was sought for the alleged overpayments.

Judge Learned Hand wrote the opinion, with which he disagreed in part. Treating the suit as one for moneys had and received in quasi contract, by which the parties were deemed to have agreed (contrary to the express terms of the charter) that additional charter hire should be at the rate prescribed by statute, the Court concluded that the *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, was controlling, although there was disagreement as to how far that decision went.

In the *Krauss* case a shipper had agreed to pay a water carrier a rate of $10 per thousand feet for transportation of lumber with an express proviso that if a regular carrier charged a lower rate for similar cargo the lower rate should apply. The carrier demanded and received the rate of $10. But a rate of $8.50 had been charged by a regular carrier and the shipper demanded and was refused refund of the difference. The Supreme Court held that even as an action for money had and received it was cognizable in admiralty since it was *based upon breach of an express maritime contract.*

United Transportation involved a claim for relief against a *fraudulent contract* made by a common officer of both parties. There the Court cited *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1, 16, 17, Fed. Cas. No. 13,590, in which Judge Story said "They (courts of admiralty) cannot * * * grant relief against a fraud" and the Second Circuit went on to say:

> "The fundamental question is whether the general manager of the respondent corporation induced by his interest in the libellant corporation betrayed his trust. But this question is not maritime in its nature" (185 Fed. at 391).

It is a fact, moreover, that although the *United Transportation* case was cited by the respondent in its brief in the *Krauss* case the *Krauss* opinion did not refer to it.

The *Silva* case was an action at law by a shipper against a finance company which had been financing the carrier and to which the carrier had paid freight money received from the shipper for a voyage that was abandoned. There was no contract, maritime or otherwise, between the shipper and the finance company. Rejecting the defendant's argument that the suit was maritime and governed by the rules of admiralty, Judge Augustus Hand said:

> "The plaintiff's claim is based on the assumption that *the maritime contract upon which the freight moneys were paid was rescinded* and that the defendant ought, in equity and good conscience, to return to them an equivalent amount with interest because it received the freight moneys knowing that they were paid for a voyage that was abandoned * * *" (163 Fed. [2d] at 604) (emphasis writer's).

The *Krauss* case, as we read it, is authority for the proposition that an action for money had and received in breach of a maritime contract is cognizable in admiralty. It does not hold that admiralty has jurisdiction of an action for fraud, as in *United Transportation*, or of an action against the recipient of funds who was not a party to a maritime contract, as in *Silva*. The case at bar is analogous to both these cases and has nothing in common with *Sword Line*. It would be carrying *Sword Line* and *Krauss* far beyond the reasonable limits of their own logic to suggest that they have any significant bearing upon *United Transportation* or *Silva* as precedents within the framework of the case at bar. Whatever the holding may be as to admiralty jurisdiction to actions for money had and

received, there is no authoritative precedent for the suggestion that an action for fraud is cognizable in admiralty.

In the cases which allege a violation of some term of the contract, the basis for the action is found in the admiralty contract and that determines the question of jurisdiction. But in the case at bar the claim is one for fraud and misrepresentation. The fact that the money obtained through alleged fraud and fraudulent representations was for a passage does not change the true nature of the action, which is to recover damages for fraud and false representations.

We submit that no matter whether the interpretation of the *Krauss* decision is expanded to give admiralty jurisdiction to an action for money had and received based upon an implied promise to repay moneys paid in excess of the stipulated freight, it cannot and should not be interpreted to hold that admiralty has jurisdiction of an action to recover damages for moneys paid through fraud and fraudulent representations. Particularly must this be so where, as in the case at bar, *the libellants seek the remedies of arrest to enforce the payment of a claim based upon fraud, because in a civil action the defendant would be entitled to a trial by jury of the issues as to whether or not the respondent did commit such fraud, whereas in admiralty, the respondent would be deprived of the rights afforded him by the Constitution in a civil action on the law side of the Court.*

The attorney for the libellants recognized that the Federal Court did not have admiralty jurisdiction as evidenced by other proceedings and actions brought by him on behalf of the same libellants to recover the same monies sought in the admiralty suit.

On December 15, 1947, the libellants represented by Mr. Graham and acting through him instituted an action in

the United States District Court for the Southern District of New York against Todd Shipyards Corporation. The complaint in that case alleged that it was a group action pursuant to Rules 18, 19, 20 and 23 of the Rules of Civil Procedure; that the plaintiffs had paid the passenger agent for the "SS City of Athens", for the July 15, 1947 sailing, the sum of $130,022.69; that the moneys were paid to the defendant, Todd Shipyards Corporation, and that said moneys were appropriated to the use of the Todd Shipyards Corporation. The complaint also alleges that on July 12, 1947 the "SS City of Athens" was seized by Todd Shipyards Corporation, and on July 14th the said corporation filed a libel against said "SS City of Athens" on a writ of foreign attachment against the moneys in the hands of the general passenger agents.

By the allegations of said complaint it was shown that Mr. Graham knew about the repairs to the ship "SS City of Athens"; knew of the very substantial charges that were made by Todd Shipyards Corporation for these repairs; knew of the fact that the moneys for the passages were paid to the general passenger agent; knew that these moneys were turned over to Todd Shipyards Corporation in part payment of these invoices; knew that Todd Shipyards Corporation seized the vessel before the date of sailing and knew that it had attached all moneys in the hands of the general passenger agent. These allegations in the said action contradict the allegations made in the libel in the case at bar of any fraud or application of the moneys collected from the passengers for the sailing to Hanioti's own use.

The Todd Shipyards Corp. appeared in the said action and interposed an answer alleging that the Federal Court was without jurisdiction; that no proper cause of action was alleged and that the relief sought was the same relief as in the action pending in the United States District Court

for the District of Maryland entitled "Todd Shipyards Corporation against The City of Athens, et al.," Civil Action No. 44-323, in which the plaintiffs in said action had intervened; and that thereafter, upon motion of the defendant, District Judge Bright dismissed the complaint as to all plaintiffs except Archawski for failure to allege the jurisdictional amount, with prejudice. In other words, the Court determined that each plaintiff has a separate cause of action and each plaintiff was required to allege the jurisdictional amount to institute a suit. The claims of the plaintiffs could not be considered as a whole but had to be considered separately. This action was finally dismissed with prejudice by Senior Judge John C. Knox for failure to post a bond as security for costs by reason of the fact that Archawski was a non-resident.

Thereafter, the libellants instituted an action against respondent and the Todd Shipyards and others in the Municipal Court of the City of New York, Borough of Manhattan, First District, in an action for fraud or injury to property. A motion was made by Todd Shipyards Corporation and A. J. Armstrong Company, Inc. to dismiss the complaint for lack of jurisdiction and the motion was granted in the Municipal Court. An appeal was taken to the Appellate Term and the Appellate Term of the Supreme Court, First Department, in *Acker, et al.* v. *Hanioti, et al.*, stated in a decision reported in 89 N. Y. S. 2d-885, at page 886, as follows:

> "Despite the joinder of all the claims which involved common questions of fact and law, each plaintiff's claim was nevertheless a separate claim. Therefore, the jurisdictional limitation on amount was not exceeded. Vigil v. Cayuga Construction Corp., 185 Misc. 675, 54 N. Y. S. 2d 94, affirmed 185 Misc. 680, 55 N. Y. S. 2d 909, affirmed 269 App. Div. 934, 58 N. Y. S. 2d 343. The subject matter as an action for fraud or injury to property was within the jurisdiction of the Municipal Court. The notice

> of motion having been directed to the complaint generally the sufficiency of any cause of action will defeat the motion. Advance Music Corp. v. American Tobacco Co., 296 N. Y. 79, 84, 70 N. E. 2d 401, 403. The fourth and seventh causes of action are clearly sufficient."

Although the Appellate Term held that the complaint stated a good cause of action for fraud and was therefore within the jurisdiction of the Municipal Court, the Appellate Division of the Supreme Court, First Department, dismissed the complaint upon other grounds, namely, that the action was one in equity and, in an opinion reported in 276 App. Div. 78, 92 N. Y. Supp. 2d 914, discussed the nature of the action and stated, at page 915, as follows:

> "* * * Three hundred ten plaintiffs are suing for the return of money paid to purchase passage on the SS City of Athens for transatlantic voyages which were not made by said vessel. This ship was owned by a Panamanian corporation known as Sociedad Naviera Transatlantica S. A. Said corporation is alleged to have been indebted to Todd *and Armstrong. It is further alleged that moneys* procured by Sociedad Naviera Transatlantica, S. A. from plaintiffs for passage, though unearned, were paid out to the accounts of Todd and Armstrong by reason of such indebtedness. On July 12, 1947, the City of Athens was libeled by Todd in the Port of Baltimore, Maryland, by process in rem issued out of the United States District Court, with the consequence that the scheduled voyage of July 15, 1947, and all later voyages were abandoned."

and again at page 916 stated as follows:

> "* * * Money paid for passage on ships for voyages which were not undertaken form constructive trust funds for the benefit of the prospective passengers. Where, as here, if the allegations of the complaint be correct, such funds have been transferred to creditors of the transportation company, with notice

of these facts, the recipients are held accountable in equity. * * *

"Matters of this nature are cognizable in equity rather than at law. 54 Am. Jur. Trusts, sec. 248; Bogert on Trusts, 2d Ed., S. 49, page 170; Pomeroy Equity Jurisprudence, vol. 5, sec. 10; Newton v. Porter, 69 N. Y. 133, 138-140, 25 Am. Rep. 152."

B.

It is argued by the libellants that the allegations and proofs respecting the respondent alleging fraudulent machinations are ancillary to and do not change the nature of the action, citing *Swift & Co. Packers et al.* v. *Companie Colombiana Del Caribe*, 339 U. S. 684. What this argument overlooks is that in the case at bar there is no independent maritime issue cognizable in admiralty to which the alleged fraud is ancillary.

The basic rule is that admiralty is without jurisdiction of an action for fraud. *Kaufman et al.* v. *John Block Sea States S. S. Line* v. *Association of International Dist. 1, Inc., et al.*; *Home Insurance Co.* v. *Merchants Transportation Co.*; *Williams* v. *Providence Washington Insurance Co.*; *Commercial Trust Co.* v. *U. S. Shipping Board E. F. Corp.*; *United Transportation and L. Co.* v. *N. Y. & Baltimore T. Lines*; all *supra*. This rule, like most, is subject to exception. Thus, where there is an independent maritime claim admiralty will not divest itself of jurisdiction of an incidental claim for fraud. That was the holding in the *Swift* case.

There an action in admiralty was commenced upon a libel *in personam* for loss of cargo accompanied by a prayer for foreign attachment. The libel was filed on March 7th, 1948, and on the next day a supplemental and amended libel was filed and on the basis of certain allegations to the effect that a transfer was made of the Alacran to another corporation which was named in the supplemental complaint in

fraud of the rights of libellants without consideration. The Court held that the relief seeking to set aside the transfer as fraudulent is only an incident of an admiralty claim arising upon a contract of affreightment supplemented by the charges of negligence in the non-delivery of a sea cargo, matters obviously within the admiralty jurisdiction and that the allegation of a fraudulent transfer is a subsidiary or derivative issue in the litigation and, therefore, the Court of admiralty did have jurisdiction. The Court, however, stated at page 865, as follows:

> "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property. E. G. v. Eclipse, 135 U. S. 599, 608, 10 S. Ct. 873, 875, 34 L. Ed. 269 and cases cited."

In the case at bar, the charge of obtaining moneys through fraud and fraudulent representations and willful conversion are not incidents of a cause of action in admiralty, it is the cause of action itself. Since fraud is the sole issue in this case it falls within the class of cases subject to the basic rule that admiralty is without jurisdiction and the exception exemplified by the *Swift* case is wholly inapplicable.

C.

The libellants argue that after the proofs are in, jurisdiction of the subject matter in admiralty is determined by the proofs as reconciled to the libel and amendment would be allowed of any technical defective allegations.

In the first place, the libellants lose sight of the fact that there was no trial as such, but only an inquest where not one witness testified but reliance was placed upon transcripts of voluminous testimony in an action *in rem* pending in the United States District Court in Baltimore, Mary-

land, where libellants intervened to establish claims against the "S. S. City of Athens". The transcripts of evidence were offered in evidence en masse, and so marked, even though it is plain that the District Judge did not have an opportunity to read the said evidence to determine whether the same was admissible, relevant or intended to prove any allegations of the libel.

Secondly, no amendment was proposed by the libellants in the District Court or the Court of Appeals and it is not suggested even in the libellants' brief in this Court as to how the libel would or could be amended to sustain an action against the respondent in admiralty.

The fact is that the exhibits in evidence do not sustain the allegations of the libel as pleaded, nor would they sustain any amended allegations if those allegations were framed to present a cause of action over which the District Court would have admiralty jurisdiction.

The libellants' cause of action determines jurisdiction. Jurisdiction is established by how a claim is presented and it is the libellants' pleading that is determinative. *Eastport Steamship Co.* v. *United States*, 130 Fed. Supp. 333 (1955).

In *Peyton* v. *Railway Express Agency*, 316 U. S. 350, the Court at page 353 stated:

> "Whether a suit arises under a law of the United States must appear from the plaintiff's pleading. * * *"

POINT II

The respondent was entitled to a dismissal of the libel even after inquest because the libellants failed to make out a *prima facie* case.

The libel was not verified by any of the libellants but was verified by the attorney, alleging that none of the libellants were available in New York.

Said libel first endeavors to allege an action for fraud.

The five elements of a fraud action which must be established by the plaintiff are representation, falsity, deception, scienter and injury. *Hackner* v. *Morgan* (C. C. A. 2d Cir.), 130 Fed. (2d) 300, affirming *Eastman* v. *Morgan*, 43 Fed. Supp. 637, cert. den. *Eastman* v. *Guaranty Trust Company of New York*, 63 Sup. Ct. 266, 317 U. S. 691.

To put it another way, to support an action for fraud, the plaintiff must establish that the defendant must have made a substantial material representation, it must have been false when defendant made it; he must have known that it was false and it was made with the intention of inducing plaintiff to act thereupon; and plaintiff must have been misled and in reliance thereon did act upon it and suffered damages. *E. M. Fleischmann Lumber Corporation* v. *Resources Corporation Intern.*, 105 Fed. Supp. 681; *United States* v. *U. S. Cartridge Company*, 95 Fed. Supp. 384, aff'd 198 Fed. (2d) 456, cert. den. 73 Sup. Ct. 645, 345 U. S. 910; *Russo* v. *Sofia Brothers*, 2 F. R. D. 80.

The burden was upon the libellants to establish that the corporation which owned the "SS City of Athens" was formed by the respondent and that said corporation was his *alter ego*; that he was the owner of the American Mediterranean Agency, Inc., and that the latter was also his *alter ego* and created by him; that the moneys paid by

the libellants were collected for the respondent's account, were turned over to him and wrongfully and deliberately applied to his own use and benefit; and that the respondent manipulated his assets for the purpose of defrauding the libellants. Unless the libellants establish these facts they could not be entitled to a decree even if the Court should find that the District Court had admiralty jurisdiction.

During the course of the inquest the attorney for the libellants did not produce any libellant to give testimony in support of any allegation of the libel, or to state that they paid any moneys in reliance upon a certain advertisement, or to establish the manner in which and to whom the moneys were paid. No contracts were introduced or offered in evidence. The attorney for the libellants relied solely upon documentary evidence consisting of voluminous testimony which had been given in a prior proceeding in the District Court of Maryland in a *rem* action brought by the Todd Shipyards, Inc. against the "SS City of Athens". Said exhibits are part of the record in this case and the Court will observe that they consist of thousands of pages of testimony. The District Court in the case at bar, after an inquest, the full report of which is contained in only seven printed pages, stated, from the bench "All right, decree for the libellant". Obviously he could not possibly have read the minutes but relied upon the statements of libellants' counsel as to what said minutes contained. The only part of said minutes with which we are concerned is the testimony of the respondent in said proceeding.

The respondent was called as a witness on behalf of the present libellants, who were intervenors in the Baltimore proceedings. The theory of the intervenors was that Todd Shipyards, Inc., the libellant in the Baltimore proceedings, had received the passage moneys with full knowledge of the fact that they were not earned. The inter-

venors, the present libellants, relied upon the testimony of the respondent to support their theory. The testimony in this respect may be succinctly summarized as follows:

The respondent testified with regard to the purchase of the ship "City of Athens" as follows:

> "Q. When did Sociedad acquire the SS City of Athens? A. October 1946.
> Q. From whom was it purchased? A. Ishrandtsen Company.
>
> Mr. Williams: Did he say what date in October or just October?
> Mr. Graham: Just October.
>
> Q. What did you pay for it? A. I think $430,000.00 or $435,000" (p. 1148, Vols. 11 and 12).

He further testified that after the ship was purchased they decided to make certain repairs and in that respect testified as follows:

> "* * * A. When we bought the City of Athens the name of the ship was the Ville D'Anvers, we decided to do some repairs on that ship and Mr. K. Gratzos recommended to put the ship into Todd Shipyard. He made all the arrangements, and when we bought the ship, it went directly to the Todd Shipyard in Brooklyn.
> Mr. Gratzos was an expert in shipping business all his life. He told me that the repairs that were intended to go on that ship, they would never exceed $80,000. We took the ship into the Todd Shipyards. It was on Saturday afternoon and Monday morning they started work on that ship. Mr. Gratzos, he appoints a supervisor, Mr. Harry Williams" (p. 1149 of Vols. 11 and 12).

He further testified as to the number of voyages made by the "City of Athens", the charges for repairs and the payments made on account of said repairs as follows:

> "* * * A. That will take a little time to have the underwriters agree to the exact amount. That time

the ship has been delayed on account of the heavy water damage about a month, I think exactly 29 days. The ship sailed again for the second time by the end of January. Then it got back sometime in March. Then it sailed again and got back again sometime in May. All this time it was tremendous pressure from the Todd Shipyards for money. We gave them about, I think about $170,000. additional money.

Q. Where did you get that? A. Passengers' money. I think I should say what happened before we get to that account of the Todd Shipyards. Sometime in December we received a bill from the Todd Shipyards in which they claim about $600,000. for repairs on that ship—in all $600,000.

Q. What was the date of that? A. Sometime in December, 1946. I was very much disturbed about those charges and I went down and I saw my architect, Mr. Phillip Rhodes. Mr. Rhodes called Mr. Stehr.

Q. Who is Mr. Stehr? A. Associate or assistant to Mr. Rhodes. I gave to him the bill which has been rendered to me from Todd Shipyards. Mr. Stehr and Mr. Rhodes couldn't believe that the repairs on that ship can be $600,000. Both of them, they say it is impossible for the repairs which they do to that ship to run as high as $600,000.

* * *

Mr. Graham: Will you read the last sentence of the witness' answer?

(Answer repeated by stenographer.)

Witness: Then Mr. Stehr called Harry Williams and he makes an appointment with him. I was insisting on going to the Todd Shipyards then after I heard the story to find out why they charged me $600,000 when the work should never exceed what was done on the ship $200,000. We went out, Mr. Stehr, Mr. Harry Williams and myself, went out to Brooklyn to the Todd Shipyard and we spent one whole afternoon down there". (pp. 1154, 1155 and 1158 of Vols. 11 and 12).

* * *

"*By Mr. Graham*:

Q. Did Mr. Williams ever apprise you of the extent of these bills as they progressed from time to time? A. No, I approached him and I told him 'I hear the bills run too high' and he told me 'They are crazy. Don't listen to irresponsible persons. I know this work. It will cost nothing what they say.' When we beat on that ship the alterations cost $600,000, $700,000 or $750,000, the final bill, everybody was surprised. They couldn't believe it." (p. 1185 of Vols. 11 and 12).

* * *

"Q. Who was the American Mediterranean Ageney, Inc.? A. The ticket agency, the passenger money.

Q. Did the American Mediterranean Steamship Agency have anything to do with the solicitation of cargo or receive the cargo money? A. No, only passengers.

Q. At any time? A. At no time" (p. 1191 of Vols. 11 and 12).

* * *

"Q. Did Sociedad ever receive any moneys from the American Mediterranean Steamship Agency? A. Yes.

Q. Approximately how much money?

By the Commissioner:

Q. That is from passenger fares? A. I think we got over $150,000.

By Mr. Graham:

Q. What was done with the money? A. It was paid to Todd directly or indirectly.

Q. Did Sociedad receive any money from any other source whatever outside of American Mediterranean Steamship Agency, Inc.? A. I don't think so."

* * *

"Q. During the time Todd was demanding money did they demand the passenger monies? A. Yes. Mr. Riordan said 'Where is the passenger monies?'

Mr. Varian: I object. He put the answer in the witness' mouth.

X. Mr. Commissioner, that is the honest God's truth." (pp. 1193, 1194 of Vols. 11 and 12).

* * *

"Q. Do you know whether the American Mediterranean Steamship Agency, Inc., received additional moneys from time to time on account of passage? A. Of course.

Q. But you don't know when it received it or how much was received? A. No.

Q. Speak for yourself personally? A. He used to call me on the phone once in a while and give me a report of it.

Q. How much of that money, if any at all, was ever turned over to you personally by Mr. Letts? A. To me personally as Basil Hanioti?

Q. Yes, as Basil Hanioti? A. Nothing" (p. 1252 of Vols. 11 and 12).

The present libellants' claims were dismissed in the Baltimore proceeding on the ground that the Court had no jurisdiction to entertain their claims. The Court held that their claims, if established, constituted in personam claims and not claims against the ship and therefore could not be entertained in the Baltimore proceedings, which was purely in rem.

It is submitted that there is no testimony in the Baltimore proceeding which justifies any finding that the respondent committed any of the frauds attributed to him in the libel in the instant case or any other fraud. If it be contended that the libellants are not bound by the respondent's testimony in the Baltimore proceeding, although, they vouched for his credibility in calling him as their witness, this would justify only a rejection of his testimony if it were to be disbelieved. This did not take the place of the necessary affirmative evidence to establish proof of the requisite fraudulent acts.

If the testimony of other witnesses in the Baltimore proceeding offered in evidence in the instant case were to be considered, reference being made especially to that of Walter J. Letts, it is submitted that such testimony, rather than supporting the libellants' contentions that the respondent formed, owned or controlled the American Mediterranean Steamship Agency, Inc., disproves such allegation.

Walter J. Letts, who was produced on behalf of the various passenger claims represented by Mr. Graham and Mr. Hillman, testified as follows:

"Q. Mr. Letts, are you connected with the American Mediterranean Steamship Agency, Inc.? A. Yes.

Q. In what capacity and for how long have you been so connected? A. Since its inception and as President.

Q. When and where was the American Mediterranean Steamship Agency, Incorporated, organized? A. It was registered under the Assumed Names Act in New York City in early February while awaiting incorporation, which I think went through in New York on the 27th day of February, 1947 (p. 716 of Vol. 6).

Q. Where is the American Mediterranean Steamship Agency, Inc.'s principal place of business located and how long has it been such? A. At 11 West 42nd Street in New York City and its inception in early February" (p. 717 of Vol. 6).

* * *

"Q. Mr. Letts, I hand you Passenger Exhibit 4 for Identification and ask you what it is. A. It is the contract between our agency as passenger agents and the Sociedad Naviera, who owned the City of Athens."

* * *

"Q. Will you please describe your firm's duty with respect to its capacity as general passenger agents? A. We controlled all of the berthings on the City of Athens, both east and westbound. When I say westbound, that means from the Mediterranean area to New York, as well as the space from New York into the Mediterranean area. We publicized it by mail and advertising in the travel trade journals and mail

campaigns, sending them various schedules, rate structures and the sale of the tickets through the 1,800 odd agents throughout the United States.

Q. Can you describe the City of Athens as to the type of vessel, the nature of trade which she was engaged in and her general carriage? A. She carried approximately 200 passengers and freight into the Mediterranean area.

Q. Since your firm's appointment as general passenger agent, have you performed the duties as you have outlined and as has been incorporated in this agency agreement? A. We did.

Q. Will you please describe the mechanics of such advertising and promotional work, such as material used and requirements in order to secure space? A. Direct mail campaigns to the various agents building up the type of accommodations that were available, the prices that were being charged and, as I said, through advertising in the trade journals among the agents in the agency business.

Q. Was it a prerequisite to the issuance of a passenger ticket that the passage money be prepaid? A. It was.

Q. In your advertising and promotion, did your firm disclose who the owners of this vessel were to the potential passengers? A. No, we were never called on nor did we deem it necessary.

Q. Were all passage monies that were required to be paid before the issuance of a passage ticket received by your firm? A. Yes, all monies were received by us before a ticket was issued" (pp. 718, 719 and 720 of Vol. 6).

* * *

"A. The American Mediterranean Steamship Agency, Inc., no. It was a separate corporation owned by ourselves. When I say ourselves, I mean World Travels, Inc." (pp. 762 and 763 of Vol. 6).

* * * * * * *

"Q. It has been testified here before on the Todd claim with respect to an organization called World Travels, Inc.—and I made the statement here that I would have you present to clear up that matter—tell

us just who World Travels is? A. The first part of your question was what?"

* * *

"A. World Travels is an organization of which I am President, who are passenger agents for all conference lines and all air lines and doing a general travel business.

Q. That is all in connection with that. What is your title in World Travels? A. President.

Q. On June 13th, what was your title? A. On June 13th, President.

Q. On June 13th, did you pay to Todd Shipyards through World Travels the sum of $10,000 by check? A. I did, with a World Travels check" (pp. 784 and 785 of said Vol. 6).

The testimony shows that the American Mediterranean Steamship Agency, Inc., was the passenger agent and that all passenger moneys were received by said corporation since early in February, 1947, and that the respondent was neither an officer of said corporation, nor a stockholder, but, on the other hand, that Walter J. Letts was President and that said corporation was owned by World Travels, Inc., of which Walter J. Letts was also President.

On the basis of the record the libel should have been dismissed at the conclusion of the inquest because there was no evidence of false representation, fraud, or conversion on the part of the respondent.

Since the respondent Hanioti filed an answer placing in issue all of the material allegations of the libel, the burden was on the libellants to establish the allegations of the libel, even though he had failed to appear at the trial.

A case directly in point is *Bass* v. *Hoagland*, 172 Fed. (2d) 205, wherein the Court, at page 210, stated as follows:

"* * * When Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge

could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no fault was generated; the case was not confessed. The plaintiff might proceed, but he would have to prove his case."

POINT III

The entry of a default judgment against the respondent violated his legal rights and the refusal to set aside said judgment, after motion, constituted an abuse of discretion by the District Judge.

A.

Frank H. Cooper, Esq., one of the attorneys of record who filed the answer on behalf of the appellant, appeared before the Trial Court and stated that he did not know where the respondent was and that the last he heard of the respondent the latter was supposed to be in London and that he did not know when the respondent was coming back. Mr. Cooper did not state or indicate that he had sent any notices to the respondent advising him of the date fixed for the trial of the action. Mr. Cooper's statement indicated that he did not advise the appellant of the date of trial.

The respondent, in the affidavit submitted in support of the motion to vacate the default decree, emphatically stated that neither Frank H. Cooper nor Frank Delaney advised him that the case would come on for trial on November 23, 1954. The respondent, in that affidavit, stated that as late as 1953 Mr. Delaney advised him that he was no longer respondent's lawyer; that respondent had paid Mr. Delaney $30,000 in the year 1952 for the purpose of representing him in different matters and that when he was advised that Mr. Delaney did not represent him any more he requested Mr. Delaney to turn over the

files in the instant case, as well as in other cases, which he refused to do, requesting additional fees, even though the services rendered on behalf of the respondent did not have a value of anything like the $30,000 already paid.

George Stathos, an associate of the respondent, stated in an affidavit submitted on behalf of the respondent in support of the motion to vacate the default decree, that Mr. Delaney did advise him on the telephone that the case would be reached in the early part of December. Mr. Stathos also corroborated the statement made by the respondent that Mr. Delaney requested additional fees of $20,000, even though he had already received $30,000, and that he had refused to turn over the files to the respondent unless he received the additional sum of $20,000.

The default on the part of the respondent was therefore neither wilful nor intentional. Mr. Cooper's presence during the course of the inquest and his participation, or lack of participation, conclusively establishes that the respondent was not represented at the trial. If the presence of Mr. Cooper at the trial be considered a form of representation then again it is clear that such participation by Mr. Cooper was not the representation of an attorney on behalf of a client but that the representation, if it can be called such, was clearly antagonistic to the respondent.

Mr. Cooper, after making derogatory and accusing statements against the respondent with respect to the vessel "Basile," in a half-hearted manner asked the Court below for an adjournment of the trial. Did Mr. Cooper expect the Court below to grant an adjournment when he advised the Court that the respondent, through machinations, turned the vessel over to the mortgagee (which was the Bankers Commercial Corporation, a reputable company), and informed the Court that since that time he had not seen hide nor hair of the respondent since and that he did not know where he was, other than he was supposed to be

in London, and had no knowledge of when he was coming back? After practically inviting a denial of the motion for an adjournment, and the application was denied, Mr. Cooper stated "Then I will sit here and just see what is happening."

Having taken that position Mr. Cooper should not have told the Court that he did not challenge the authenticity of certain documents offered on behalf of the libellants. Towards the end of the trial, when the Court asked whether there was any testimony by the respondent, Mr. Cooper stated as follows: "If the Court pleases I guess I have been under a misapprehension. I thought this was an inquest. We have defaulted."

Further, at the very conclusion of the case, before the Court below rendered a decree for the libellants, Mr. Cooper stated as follows: " * * * I think I may ask Mr. Graham to include in his claim here our claim for fees because we have never been paid." This statement is contradicted by both the respondent and Mr. Stathos in their affidavits in support of the motion to vacate the default decree. This request of Mr. Cooper is consistent with the statements made by the respondent and Mr. Stathos that the attorneys for the respondent had refused to represent him unless they received additional fees.

From the available facts it is clear that had Mr. Cooper participated and defended the action, even without the presence of the appellant, no judgment would have been obtained against the respondent because the libellants did not have the proof necessary to sustain the allegations of the libel.

No written notice was served upon the respondent of the application for judgment at least three days prior to the hearing of such application as required by the Federal

Rules of Civil Procedure. Rule 55(b)(2) of the Federal Rules of Procedure reads as follow:

> "(b) Judgment. Judgment by default may be entered as follows:
>
> * * * *
>
> "(2) By the Court. * * * If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

In the case of *Bass v. Hoagland, supra,* the Court, in discussing Rule 55 (b) (2) of the Federal Rules of Civil Procedure, stated, at page 209, as follows:

> "* * * We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. * * *"

and again at page 209 stated as follows:

> "* * * There was appearance and pleading as the summons required, and a demand for jury trial by the plaintiff which operated as a demand by the

defendant also unless withdrawn by his consent, which was not given. Rule 38(a, b, d). The judgment nevertheless recites that there was a default because counsel for defendant at some previous date withdrew as such. There was no withdrawal of the defendant's appearance and pleading and demand for a jury. The case was still not in default and thereby confessed. If the plaintiff wished to present it to the court as in default, he was bound to notify the defendant or his counsel three days in advance of the hearing. Rule 55(b)(2). The withdrawal of counsel did not make the notice unnecessary, but made it servable on the defendant instead of his counsel. It was not given and the judgment does not recite that it was. It does say that evidence was heard, presumably on the question of damages, but there was no jury verdict thereon as required by Rules 38 and 55(b)(2). The answer says there was no evidence heard at all, and this is admitted for the present, and an admitted fact may be used on collateral attack as well as the record itself; 49 C. J. S., Judgments, §§ 421, 425, Note 17. The court reporter's record would show the actual truth. The remarkable fact appears on the face of the judgment that the damages in a personal injury suit were fixed in the exact amount sued for, and 'Approved' by plaintiff's counsel. The judgment states the plaintiff was not present at the trial, but only his counsel; and that no defendant was present in person or by counsel, so there could have been no waiver of any right. Bass, living in Texas, did not know that the case had been called for trial till he was served in the present suit. This does not look like due process of law under the Constitution, nor even like a judicial trial. * * *"

In the case at bar, too, the action of Mr. Cooper constituted a withdrawal and the respondent was entitled to three days' notice, as provided by Rule 55(b)(2) of the Federal Rules of Civil Procedure. The fact that Mr. Cooper was in court did not alter the facts of the situation. There had been no notice to the respondent and no

written notice to Mr. Cooper that a judgment would be sought on November 23, 1954, by default, as required by Rule 55(b)(2). This is particularly true in the case at bar, when Mr. Cooper indicated to the District Court an antagonistic attitude toward the respondent and made the statement that he was not participating in the proceeding.

B.

In a case involving a judgment of over $130,000, where the decree contains a provision for execution against the person, the matter should not be determined by default if it can be reasonably avoided, and any doubt should be resolved in favor of the application to set aside the judgment so that the case may be decided on its merits.

The respondent should be given an opportunity to try the case on the merits represented by counsel desirous of protecting the interest of his client. It is difficult to understand how counsel permitted a decree containing a provision for execution against a person where the amount is over $130,000 to be entered without taking some affirmative step to ascertain the whereabouts of Hanioti, the appellant, and giving him an opportunity to defend himself and to answer the application of such nature.

The courts have held that matters involving large sums should not be determined by default judgment if it can be reasonably avoided and any doubt should be resolved in favor of petition to set aside judgment so that cases may be decided on their merits.

Tozer v. *Charles A. Krause Milk Company*, 189 Fed. 2d 242;

Henry v. *Metropolitan Life Insurance Company*, 3 F. R. D. 142.

POINT IV

The inclusion of a provision for execution against the person of the respondent in the decree violated the respondent's legal rights.

A.

The libel did not set forth a cause of action on contract, with an allegation of fraud in the incurring of the liability.

The body execution was included in the decree and judgment pursuant to the purported authority of Rule 20 of the Admiralty Rules, which provides as follows:

> "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

Assuming, for the purposes of this argument, that Rule 20 authorizes a body execution in a proper admiralty case, the validity of the inclusion of the body execution in the instant case is governed by the New York State law.

The Court below granted the body execution on the authority of Section 826, subdivision 9, of the Civil Practice Act, which provides as follows:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or

dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

The question arises, therefore, whether the libel in the instant case sets forth a cause of action upon contract. It is submitted that it does not. The gravamen of the libel is fraud.

The libel does not allege, as required by Section 826 (9) of the Civil Practice Act of the State of New York, that the respondent was guilty of fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent. Nor did the appellant, as required by said section, prove the frauds at the inquest.

It is insufficient to satisfy Section 826, subdivision (9), that a complaint set forth some allegations of contract and some allegations of fraud. It is essential that the fraud be perpetrated in incurring the liability on the contract. *Novotny* v. *Kosloff*, 214 N. Y. 12.

B.

There was no evidence offered at the inquest to prove that the respondent committed any fraud or that he conveyed any assets in fraud of creditors.

In the State Court, under Section 826, subdivision (9), it is necessary for a plaintiff not only to plead a cause of action in compliance with its requirements but also to prove "the fraud on the trial of the action; * * *." It is respectfully submitted that there was not one iota of evidence submitted before Judge Walsh, at the inquest, to prove any of the requisite allegations of fraud.

What was said under Point II of this memorandum is equally applicable here and, for the sake of brevity, will not be repeated.

C.

The issuance of the body execution was an abuse of discretion.

Assuming, for the purposes of this argument, that the Court in a proper case would be authorized to issue a body execution, it is respectfully submitted that it was an abuse of discretion to issue one under the circumstances of the present case.

Section 764 of the Civil Practice Act provides, in part, as follows:

> "* * * The issuance of the (body) execution shall rest in the discretion of * * * the court or judge."

The quoted provision was enacted into the Civil Practice Act in 1940. Prior thereto the issuance of body executions had been granted to judgment creditors as a matter of right, if the case came within the appropriate provisions of the Civil Practice Act.

It is respectfully submitted that a body execution should not be granted except when the granting thereof will aid the judgment creditor in the enforcement of his judgment. In the present case the judgment requires the respondent to pay (inclusive of interest) the sum of approximately $200,000.00. The libel alleged that he was hopelessly insolvent in 1946 and 1947. There is no proof in the record to show that he became enriched, or even solvent, thereafter.

The only incidents which would follow upon the upholding of the body execution in the instant case would be to commit respondent to prison without any financial benefit to the libellants. The process of the Court would therefore

be purely punitive rather than in aid of the enforcement of a judgment. It is submitted that that would constitute a subversion of the civil mandates of this Court.

If respondent is deserving of any punishment (and we submit that the record before this Court utterly fails to show that he is), the proper tribunal for meting out such punishment is a criminal court, particularly is this so in the present case, where the respondent has been tried in absentia, unrepresented by counsel. Concededly, a defendant could not be imprisoned after a trial in absentia in a criminal case, where he is charged with a felony.

D.

The rules of admiralty do not authorize the issuance of a body execution in the enforcement of admiralty decrees or judgments.

A reading of Rule 20 of the Admiralty Rules shows that it contains two sentences. The first sentence authorizes the issuance of an execution against the property of a respondent to enforce a decree of judgment in admiralty. The second sentence provides that "any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

It is submitted that the second sentence of Rule 20 cannot be read so as to incorporate into the first sentence the right to enforce a decree by the issuance of a body execution. If it had been intended by Rule 20 that a body execution could be used to enforce an admiralty decree it would have been a simple matter to have so provided in the first sentence. The only reasonable construction that can be placed upon the second sentence of Rule 20 is that a libellant shall have the right to avail himself of all remedies of the state or federal law for the enforcement of the execution against the property of the respondent, as for example,

supplementary proceeding, receiverships, third party orders and subpoenas, etc.

It is submitted that it is stretching the first sentence of Rule 20, by implication, to incorporate therein the odious remedy of a body execution, which is the last vestige of the archaic remedy of imprisonment for debt. The Rules of Admiralty were promulgated by the Supreme Court of the United States. It is respectfully submitted that had the Supreme Court intended that a body execution be available to a libellant for the enforcement of an admiralty decree the Supreme Court would not have left it open to implication but would have expressly so stated.

A case in point is *Friedly et al. v. Giddings et al.*, 119 Fed. 438. In that case the plaintiff moved for a writ of body execution, according to the state statutes. The Court denied said motion stating, at page 441, as follows:

> "The plaintiffs have moved for an adjudication by the court that the cause of action arose from the wilful and malicious act of the defendants, and that they ought to be confined in close jail, and for a certificate thereof upon the execution, according to the statutes of the state (V. S. 1751). The statute of the United States providing that the practice, pleadings, and forms and modes of procedure in civil causes other than those in equity and admiralty cases shall conform to those in the state courts, applies to those for procuring the judgment, and not to those subsequent (Rev. St. U. S. 914 [U. S. Comp. St. 1901, p. 684]; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117); *and that entitling the party recovering a judgment in a common law cause to similar remedies upon it to those of the state 'to reach the property of the judgment debtor' applies to property and not to the person* (Rev. St. 916 [U. S. Comp. St. 1901, p. 684]). This motion therefore cannot prevail" (emphasis writer's).

So in the instant case, the "similar remedies" provided in the state statute apply only to the property and not to

the person of the judgment debtor. In that connection it must be noted that the requirements of the Revised Statute known as Section 916, on which the *Friedly* decision, *supra*, is based, are presently incorporated in Rule 69 of the Federal Rules of Civil Procedure and that the language of said Rule is very similar to Rule 20 of the Admiralty Rules. It appears from the *Friedly* case that since Rule 69 does not expressly refer to body execution the proceedings supplemental to and in aid of a judgment refer only to proceedings against the property and not against the person of a judgment debtor.

E.

The decree and judgment are equitable in nature; hence, the body execution is unauthorized.

The decree in the instant case provides that " * * * Basil Hanioti is hereby directed to pay said sum of $130,383.69 and costs in the sum of $35.00, making in all the total sum of $130,418.69, with interest thereon at 6% from the 23rd day of July, 1947, until paid, to the libellants through their proctor, Harry D. Graham, Esq., for distribution amongst them together with their costs as taxed; * * * " (App. 17a). Said decree is clearly equitable in nature for it directs respondent to pay a sum of money. A judgment in an action at law could not properly contain any such direction but the Court could only grant judgment to a plaintiff.

An analysis of Section 764 of the Civil Practice Act reveals that a body execution is authorized only to enforce a judgment in an action at law. A judgment directing a plaintiff to pay a sum of money is equitable in nature and may, in a proper case, be enforced by contempt proceedings but not by a body execution (Sections 505; 764, of the Civil Practice Act).

A case in point is *B. I. P. (Export), Limited* v. *Isaacs et al.*, 10 Fed. Supp. 872. Said suit was brought in equity

and the plaintiff moved to amend the judgment by inserting a provision for execution against the body of the defendant. However, the Court denied said motion, stating, at page 873, as follows:

> "Execution against the person, by New York law, may issue where the action is one of those in which the defendant may be civilly arrested because of the nature of the cause of action. Civil Practice Act, § 764. The actions wherein a civil arrest of the defendant is available to the plaintiff are set forth in section 826. Among them is an action to recover for money received against a person in a fiduciary capacity. But the New York courts have held that execution against the person cannot be issued in a suit in equity, except in those cases where a common law action is brought on the equity side for special reasons. Fenton v. Duckworth, 131 App. Div. 291, 115 N. Y. S. 686; Broome v. Cochran, 31 Misc. 660, 64 N. Y. S. 1043."

In the instant case too the decree directing respondent to pay a certain sum of money is equitable in nature and the Court below had no power to issue body execution in connection therewith.

F.

The body execution is unauthorized inasmuch as there was no trial of the action, within the meaning of Section 826, subdivision (9) of the Civil Practice Act.

As previously pointed out, it is incumbent upon a plaintiff to establish the necessary fraud allegations on the trial of the action in order to obtain a body execution. This provision has been given a strict construction by the New York courts, whose decisions are controlling on the instant question. In the case of *Collins et al. v. Toombs*, 63 N. Y. Supp. (2d) 545, the Appellate Division of the New York Supreme Court, Third Department, reversed an order denying a motion to vacate a body execution which had

been obtained by the plaintiff after the defendant had defaulted on the plaintiff's motion for summary judgment. The Court, at page 546, held as follows:

> "* * * if the action is held to be on contract, with an allegation of fraud, the plaintiff would have been entitled to recover on the theory of fraud, and to an order of arrest, only when he proved fraud on the trial of the action." (C. P. A., section 826, subdivision 9). A summary judgment proceeding is not a trial but merely a proceeding to determine if there are triable issues of fact that require a trial."

By the same token, an inquest is not a trial. There is no opportunity on the part of the defaulting party to cross-examine witnesses or to produce his own witnesses. The proceeding is purely *ex parte* and has no stronger basis than affidavits on a motion for summary judgment.

The rationale of the *Collins* case, *supra*, is sound for it requires proof on the stand rather than by affidavit to justify what amounts to imprisonment for debt. This is particularly applicable on the default in the present case where the appellant did not sit idly by but hastened to move to set aside the decree on the very day following the granting of said decree.

POINT V

The appeals were timely and the Court of Appeals had jurisdiction of the appeals taken from the orders denying the motion to set aside the default decree as well as the appeal from the default decree docketed as a judgment.

The respondent appealed from the decision and order of January 11, 1955, by notice of appeal dated and filed February 9, 1955—within a period of less than thirty days. The respondent appealed from the opinion, decision and

order of February 9, 1955, by notice dated and filed February 17, 1955—within a period of less than thirty days. The respondent also appealed from the decree docketed as a judgment on January 11, 1955, by notice of appeal dated March 24, 1955—within a period of ninety days from the docketing of the decree.

All of the appeals were timely and properly taken. The orders from which the appeals were taken were based upon a motion to set aside a default decree entered after inquest. Such orders are final because they affect the ultimate outcome of the controversy.

A case in point is *Weilbacher* v. *J. H. Winchester & Co.*, 197 Fed. (2d) 303 (U. S. C. A. 2 Cir.), wherein the Court, in discussing the question of the finality and appealability of orders based upon motions to set aside judgments, stated, at page 305, as follows:

> "At the outset we must determine whether the order appealed from is a final order within the purview of Section 1291 of the Judicial Code. 28 U. S. C. A. § 1291. Obviously, the objective of that section is to forestall appellate review when the decision below has but an inconclusive effect on the final outcome of the litigation. *This is best illustrated in the example of a motion, also under Rule 60(b), to reopen a default judgment. Thus, the denial of such a motion is a final order, Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir., 189 F. 2d 242, *for by its decision the district court has indicated that no further action will be taken at that level which will change the outcome and unless the order is appealable the controversy is at an end. On the other hand, the granting of the motion is not reviewable, United States* v. *Agnes*, 3 Cir., 161 F. 2d 231, *since the ultimate disposition of the case may not be affected thereby*" (italics ours).

Another case in point discussing the finality and appealability of an order such as in the instant case is *Green-*

spahn v. *Joseph E. Seagram & Sons*, 186 Fed. (2d) 616, (U. S. C. A. 2 Cir.), where the Court, at page 619, stated as follows:

> "* * * But we are willing to go further and state our belief that the order is appealable as fully as any other final order. Rule 60(b) expressly provides that a motion made thereunder 'does not affect the finality of a judgment or suspend its operation'. An order denying such a motion puts an end to any further action by the district court and leaves the judgment in full force and effect. We think it is a final order and therefore appealable."

In *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 38 Sup. Ct. 116, the Court, at page 118, stated as follows:

> "The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that *no jurisdiction was acquired over the Stevirmac Oil & Gas Company* by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside the judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals" (italics ours).

Assuming, without conceding, that the docketing of the decree as a judgment on January 11, 1955, did not fix the time for the commencement of the ninety day period, as contended by the libellants, the appeal taken on March 24, 1955, was still timely since under Rule 73(a) of the Federal

Rules of Civil Procedure the running of the time of appeal was tolled by the motion made to set aside the judgment and therefore the time to appeal must be computed from the entry of the order denying the motion to vacate the judgment, to wit, January 11, 1955, the date of the first decision, or February 9, 1955, the date of the filing of the opinion and order. Cases supporting this rule are:

Leishman v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, 544;

Salmon et al. v. *City of Stuart, Fla.*, 194 Fed. (2d) 1004 (U. S. C. A. 5 Cir.).

In *United States ex rel. Harrington* v. *Schlotfeldt*, 136 Fed. (2d) 935, the Court, at page 937, stated as follows:

> "Appellee urges that the appeal is improperly before us in view of the fact that notice of it was filed on December 28, from a decree entered September 22. The court permitted the filing of a motion to vacate the decree on December 19, ordered the Government to answer, and set the matter for hearing. Where such motion to vacate is permitted to be filed and taken under consideration prior to the expiration of the period allowed for taking an appeal, we are of the opinion that it suspends such period, and that notice of appeal duly filed after disposition of the motion is filed and timely. Cf. Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Wayne Gas Co. v. Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. We think the Federal Rules of Civil Procedure, Nos. 6, 59 and 60, 28 U. S. C. A. following section 723c do not require a contrary ruling."

To the same effect see:

Reliance Life Insurance Co. v. *Burgess*, 112 Fed. (2d) 234;

Neely v. *Merchants Trust Co. of Red Bank, New Jersey*, 110 Fed. (2d) 525.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be, in all respects, affirmed.

Respectfully submitted,

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